

# Byline

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## Fact Questions May Save Duty To Indemnify Claims In Mass.

by Lon A. Berk, Sergio F. Oehninger, Matthew T. McLellan

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The Massachusetts Appeals Court recently held that insurers were not entitled to summary judgment on claims that they did not owe a duty to indemnify their insured for environmental claims. Issues of fact as to when the insurers issued disclaimers accruing claims and beginning the limitations period precluded summary judgment. *OneBeacon American Insurance Co. v. Narragansett Electric Co.*, 13-P-1240, (Mass. App. Ct. June 3, 2015).

### Background

Narragansett Electric Company's (NEC) corporate predecessors operated manufactured gas plants and waste disposal sites in Rhode Island and Massachusetts from the mid-1800s until the 1980s. After discovery of environmental contamination at those sites, governmental actions against NEC ensued.

NEC sought defense and indemnity coverage under primary and excess policies issued between 1945 and 1986 by OneBeacon America Insurance Co., Century Indemnity Co., American Home Insurance Co., Certain Underwriters at Lloyd's London and Certain London Market Insurance Cos. The insurers denied coverage. OneBeacon initiated a declaratory judgment action and NEC counterclaimed, adding the other insurers as third-party defendants.

The trial court granted summary judgment to certain insurers on the grounds that NEC's claims were either time-barred or fell under certain pollution exclusions in the relevant policies. The appeals court reversed.

### Decision on Appeal

To resolve choice of law issues, the Massachusetts Appeals Court applied the Restatement (Second) of Conflict of Laws § 142, under which the forum state's statute of limitations is applied, unless exceptional circumstances make the result unreasonable. Utilizing that test, the appeals court found that NEC offered no reason why it did not bring suit in Rhode Island rather than awaiting OneBeacon's action in Massachusetts. Accordingly, the appeals court applied Massachusetts' six-year statute of limitations instead of Rhode Island's 10-year statute.

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The appeals court explained that the statute of limitations for a breach of an insurance policy begins to run on the date of the insurer's alleged breach and that NEC's claims accrued when the insurers failed or refused to pay defense and indemnity costs under the policies. An action for breach of an insurance policy, however, may be tolled until the insured discovers facts giving rise to its claim. In determining the triggering event, "the factual inquiry focuses on which was the first event reasonably likely to put the plaintiff on notice that the defendant's conduct had caused him injury."

According to the appeals court, NEC's claims for breach of the insurers' duty to defend accrued when the insurers refused NEC's demand for defense costs and NEC began to incur those costs.

NEC argued that the underlying litigation must be resolved before a duty to defend claim accrues. However, the appeals court disagreed, explaining that Massachusetts does not require the underlying claim to be resolved or certainty as to the amount of a plaintiff's claim before a contract action can be maintained. NEC also argued that the statute should be tolled because the duty to defend is a continuing obligation, which the insurer might cure by the litigation's conclusion. Disagreeing with NEC's argument, the appeals court explained that, in Massachusetts, the possibility that the insurer may cure its breach does not affect accrual once the breach occurs.

Finding that NEC received the insurers' disclaimers as to the duty to defend more than six years before NEC asserted its claims, the appeals court held that NEC's claims for defense costs were time-barred. The appeals court also found that one of the insurer's failure to render a decision on NEC's request for a defense, despite a significant passage of time and despite having issued a reservation of rights letter, constituted a breach of the insurer's duty to defend commencing the limitations period.

However, the appeals court refused to grant summary judgment on the insurers' claims that NEC's claims for breach of the duty to indemnify were time-barred. The appeals court ruled those claims accrued when the insurers refused to pay environmental response costs that NEC had become legally obligated to pay. There were questions of fact as to whether and when the insurers had denied their duty to pay such costs. The appeals court explained that, unlike the duty to defend, the duty to indemnify depends on actual facts and reasonably might require more time to investigate than the duty to defend. Thus, a claim for breach of the duty to indemnify may accrue after accrual of a claim for breach of the duty to defend. The appeals court noted that the insurers continued to communicate with NEC and requested further information concerning the duty to indemnify even after issuing initial reservation of rights letters and denying the duty to defend. This was sufficient to raise a question of fact as to when the insurers' responses constituted disclaimers beginning the limitations period for duty to indemnify claims. Thus, while there was no issue of fact as to when claims for breach of the duty to defend had accrued, issues of fact remained as to when claims for breach of the duty to indemnify had accrued.

In a separate opinion, the appeals court reversed the trial court's ruling granting certain insurers' motions for summary judgment based on the policies' pollution exclusions. The appeals court held that questions of fact must be resolved to determine whether an exception to the pollution exclusion for "sudden and accidental" releases of contaminants applied. Applying Rhode Island law based on choice of law principles, the appeals court explained that "sudden and accidental" is construed as meaning "unintended and unexpected." NEC had hired a contractor to carry waste from one of its sites to a landfill. The appeals court reasoned that where an insured takes reasonable steps to ascertain whether a contractor was following the highest standards of waste disposal, any resulting contamination is unintended and unexpected from the insured's standpoint. This would mean the "sudden and accidental" exception to the pollution exclusion would apply. The appeals court held there was a question of fact as to whether NEC took such steps.

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### **Implications**

The ruling of the Massachusetts Appeals Court in *OneBeacon American Insurance Co. v. Narragansett Electric Co.* presents critical issues regarding the statute of limitations. Even though claims for breach of the duty to defend may be barred by statutes of limitations, claims for breach of the duty to indemnify may survive. This is especially true where insurers, notwithstanding earlier disclaimers or reservations of rights, continue to investigate facts relating to the underlying liability. Policyholders should maintain a complete record of all correspondence with their insurers, as such communications are likely to be key in any coverage dispute.

Finally, choice of law can have a significant effect on the applicable limitations period, which may vary greatly from state to state. When faced with a statute of limitations coverage defense, it is important for policyholders to consider whether filing a coverage action first in a particular venue may lead to an advantageous choice of law.